



# PHILIP MORRIS

INCORPORATED

120 PARK AVENUE, NEW YORK, N.Y. 10017 • TELEPHONE (212) 880-5000

May 16, 1990

Mr. Richard Costello  
President  
TBWA Advertising, Inc.  
292 Madison Avenue  
New York, New York 10017

Dear Mr. Costello:

NECTAR

This letter, when countersigned below, will constitute the agreement between TBWA Advertising, Inc. ("TBWA") and Philip Morris Incorporated ("PM"), pursuant to which TBWA will render creative marketing and advertising services as described herein for PM's prospective BEST cigarette brand. The terms and conditions of this Agreement are as follows:

1. Services.

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(a) TBWA shall provide PM with creative marketing and advertising services, meeting the highest standards of TBWA's profession and consisting of the development of proposals for long-term marketing and advertising strategies, campaigns, and promotions that will best develop the sales, positive image, and goodwill of PM's prospective BEST brand of cigarettes, which proposals the Agency shall develop and present to PM not later than June 30, 1990. TBWA's timely performance of its duties is agreed to be of the essence of this Agreement. TBWA shall render services under this Agreement in two (2) phases, as follows:

AUGUST 31

(i) Phase I, consisting of the development of general marketing concepts, including product positioning, and related advertising and promotional ideas for the BEST brand of cigarettes; and,

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(ii) Phase II, consisting of the development of specific advertising themes and campaigns based on the strategies and product positioning that were recommended in Phase I.

(b) TBWA services also shall include compiling budget estimates for the campaigns and promotions it proposes for implementation subsequent to this Agreement.

## 2. Fees and Expenses

(a) As full compensation for performance of services rendered by TBWA in connection with this Agreement and within thirty (30) days after presentation of invoices to PM, PM shall pay TBWA a total of seventy thousand dollars (\$70,000), in accordance with the following schedule:

(i) thirty-five thousand dollars (\$35,000) to be paid upon full and satisfactory completion of Phase I services; and

(ii) thirty-five thousand dollars (\$35,000) to be paid upon full and satisfactory completion of Phase II services. In no event shall PM pay TBWA's final invoice until the later of ~~June 30~~, 1990 or TBWA's final presentation to PM. *AUGUST 31*

*NECTAR* (b) If PM elects to use TBWA's proposals and retain TBWA for future advertising services in connection with the ~~BEST~~ brand of cigarettes, PM and TBWA shall enter into a subsequent Agreement for such services. Fees paid by PM in connection with this Agreement shall be deemed to satisfy fully the first seventy thousand dollars (\$70,000) in fees charged by TBWA to PM in any such subsequent agreement. If PM does not retain TBWA for further advertising services, TBWA nonetheless may retain its fees as full compensation for its services and the advertising and marketing proposals it generates.

(c) PM shall reimburse TBWA at cost for outside expenses actually and reasonably incurred, including travel expenses and external costs of production such as printing, composition, and ~~mark-up~~ *and*. TBWA agrees to incur outside expenses for services only when it cannot perform services

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Mr. Richard Costello  
May 16, 1990  
Page 3

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internally. TBWA must submit to PM for approval, in advance, any estimates of outside expenses, and, after said expenses have been approved and incurred, to receive reimbursement must submit actual invoices or other documents evidencing expenses in excess of twenty-five dollars (\$25.00), all in a manner reasonably requested by PM.

3. Audits, Retention & Inspection of Records. TBWA shall maintain records of all proofs of payment and other information relating to payments made by PM and TBWA for the services hereunder for a period of three (3) years following the dates such payments are made. PM or its designees may inspect, examine, and review such records (and make copies thereof) at reasonable times during normal business hours with reasonable notice given to TBWA.

4. Term and Termination.

(a) This Agreement shall commence on the date of its <sup>AUGUST</sup> execution and shall remain in effect until the later of ~~June 30,~~ 1990 or the date of TBWA's final presentation to PM.

31

(b) The obligations set out in Paragraphs 3, 5, 6, 7, 8 and 9 shall survive this Agreement.

5. Ownership of Materials.

(a) PM shall have exclusive ownership of any trademarks, copyrights, trade secrets, creative ideas and strategies, concepts, slogans, presentations, advertising or publicity materials or parts thereof maintained by or developed for or submitted to PM by TBWA in performing its obligations under this Agreement ("Work Product"). PM shall be the sole owner of not only all Work Product, but also all copyrights and proprietary interests inhering in Work Product, regardless of whether PM elects to make use of such Work Product and regardless of whether PM retains TBWA to provide further advertising services.

(b) By its signature to this Agreement, TBWA agrees that any copyrightable materials created by TBWA, its employees, agents, and subcontractors pursuant to this Agreement are specially commissioned works made for hire under the Copyright Act of 1976, as amended, and that PM is

2049400362

the sole and exclusive owner of all right, title and interest in said works made for hire. TBWA agrees to require all consultants and subcontractors performing services pursuant to this Agreement to sign written agreements acknowledging that any copyrightable works they create in connection with this Agreement are specially commissioned works made for hire owned exclusively by PM. TBWA further agrees, and will require all consultants and subcontractors to agree by signed writings, that if a court of competent jurisdiction should finally determine that any copyrightable material created pursuant to this Agreement is not a work made for hire owned by PM, this Agreement (or, as appropriate, the writing signed by any consultant or other subcontractor) shall operate as an outright and complete assignment of such work(s) and all copyrights inhering therein to PM.

(c) TBWA acknowledges PM's exclusive rights in its trademarks, including without limitation the ~~BEST~~ <sup>NECTAR</sup> trademark, copyrights, trade secrets and other proprietary information; agrees not to contest these rights and not to take any action inconsistent with or potentially damaging to those rights; and agrees not to make any use or disclosure of such valuable intellectual property except pursuant to the performance of its duties under this Agreement.

(d) TBWA will ensure that employees, agents, consultants and subcontractors adhere to the terms of this Paragraph.

6. Exclusivity. During the term of this Agreement and for six (6) months thereafter, TBWA will not, without the prior written approval of PM, engage in any services or similar activities for any tobacco product or any other product which competes with a tobacco product of PM.

7. Confidentiality.

(a) TBWA acknowledges and agrees that all documents, ideas, concepts, and information that it may obtain from PM are confidential and proprietary information owned exclusively by PM ("PM Confidential Information").

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(b) TBWA acknowledges and agrees that ideas, concepts, marketing strategies and tactics, proposals, data, and documents of all types developed by TBWA or its employees, agents, consultants and subcontractors in connection with this Agreement are also confidential and proprietary information owned exclusively by PM ("PM Confidential Information").

(c) TBWA agrees not to contest PM's exclusive rights in PM Confidential Information; agrees not to contest and not to take any action inconsistent with PM's exclusive rights in same; agrees to preserve the confidentiality of same; agrees that it shall not, either itself or through its agents, subcontractors or employees, use or disclose same to any third party during or after the term of this Agreement and without the prior express written consent of PM; and that it shall convey to PM all documentary PM Confidential Information promptly upon its completion of its obligations under this Agreement. TBWA further acknowledges that any use or disclosure of PM Confidential Information is likely to cause PM irreparable harm for which PM has no adequate remedy at law.

(d) TBWA agrees not to divulge <sup>NECTAR</sup> to third parties <sup>NECTAR</sup> the existence of this Agreement, the existence of PM's BEST brand project, or its relationship with PM without the prior written consent of PM. In the event that TBWA without express written consent divulges the existence of this Agreement, the existence of PM's BEST brand project, or its relationship to PM, PM may immediately terminate this Agreement, and TBWA shall have forfeited all rights to compensation for fees and expenses. TBWA acknowledges that any such disclosure would do irreparable harm to PM.

(e) TBWA will ensure that employees, agents, consultants and subcontractors adhere to the terms of this Paragraph.

8. Indemnification. TBWA shall indemnify PM for any damages, liabilities, claims, and expenses incurred by PM as a result of any claim, suit, or proceeding made against PM arising out of TBWA's performance of its duties and services pursuant to this Agreement.

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9. Insurance. Upon execution of this Agreement, TBWA shall provide PM with certificate(s) of insurance naming PM as an additional insured, issued by companies and in policies acceptable to PM, and evidencing advertiser's Liability insurance, agency form, and including professional errors and omissions liability insurance, in an amount not less than \$3,000,000. In the event TBWA is unable to name PM as an additional insured, TBWA shall provide to PM a written explanation from its insurance carrier, in which case PM may, in its sole discretion, waive this requirement. PM shall be advised not less than thirty (30) days prior to any change or cancellation, and such insurance will be maintained for the duration of this Agreement.

10. Independent Contractor. TBWA shall exercise full control and direction over its employees performing the work covered by this Agreement. Neither TBWA nor its employees or agents shall be deemed to be PM's employees or agents. It is understood that TBWA is an independent contractor. TBWA is wholly responsible for withholding and payment of all federal, state, and local income and other payroll taxes with respect to its employees, including contributions from them as required by law.

11. Miscellaneous.

(a) TBWA shall comply with all applicable laws and regulations relating to its activities hereunder, and further undertakes that the marketing and advertising proposals it develops shall be permissible under all applicable federal, state, and local laws, ordinances, and regulations.

(b) TBWA acknowledges that it is cognizant of the provisions of Title 15, Sections 1331 et seq. of the United States Code, and TBWA agrees that both it and the proposals it develops shall comply fully with that statute.

(c) This Agreement is the complete agreement between the parties, and supersedes any prior oral or written communication between the parties on the subject matter of this Agreement.

(d) This Agreement may not be amended except by a duly executed writing signed by an authorized official of PM. A

2049400365

Mr. Richard Costello  
May 16, 1990  
Page 7

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waiver by either party of any of the terms and conditions of this Agreement, in one or more instances, shall not be deemed a general waiver or a waiver of any other term.

(e) This Agreement may not be assigned by either party without the prior written consent of the other, but this Agreement is binding upon any successors in interest.

(f) This Agreement, and all matters of issue collateral to it, shall be governed by the laws of the State of New York applicable to agreements made and to be performed entirely in the State of New York.

If the foregoing accurately sets forth our Agreement, please signify your acceptance and agreement by signing the enclosed copy of this letter and returning it to the undersigned.

Very truly yours,

PHILIP MORRIS INCORPORATED

By: 

Title: VP NP Mktg

Date: 6/25/90

ACCEPTED AND AGREED AS OF  
THE DATE OF THIS LETTER:

TBWA Advertising, Inc.

By: 

Title: President/COO

Date: 5/24/90

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